Supreme Court, U.S.

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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1997

DEPUTY PAUL THRASH,

Petitioner,

v.

HERBERT GULLIFORD,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Pierce County
Prosecuting Attorney
By
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QUESTIONS PRESENTED FOR REVIEW

1. Where a suspect verbally opposes police while at the same time he physically commits a crime, does the First Amendment overcome the Fourth Amendment to shield him from arrest?

2. Where a Circuit Court interprets certain police conduct as unconstitutional but a state court upholds it under the same federal provision, do police of that state violate "clearly established" rights and lose their qualified immunity by relying on their state court's precedent?

3. May a party fail to object to an instruction and then have the jury's verdict overturned where he never appraises the trial court of the claimed error and affirmatively misleads it on the issue?

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I. REPORTED OPINIONS

The Ninth Circuit Court of Appeals opinion in this case is published at Gulliford v. Pierce County, 136 F.3d 1345 (9th Cir. 1998).

II. JURISDICTION

The opinion of a divided Ninth Circuit Court of Appeals was entered on February 27, 1998. App. "A." Rehearing was denied in another split decision on April 9, 1998. App. "B." This Court now has jurisdiction under 28 USC § 1254(1).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. U.S. Constitutional Amendment I
(See Appendix "C" for text.)

B. U.S. Constitutional Amendment IV
(See Appendix "C" for text.)

C. 42 U.S.C. § 1983
(See Appendix "C" for text.)

IV. STATEMENT OF THE CASE

Herron Island is located in Puget Sound, just within the boundaries of Pierce County, Washington. Because the island is

isolated and privately owned, a minority of its residents oppose the presence of law enforcement and oppose their neighbors who want more frequent police patrols. Ex. 12 at 3; CR 164 at RT 5, 37-41, 48, 118-19, 123, 247-48, 307-08, 601.[1] In the past this group's disturbing the peace and threatening others had fostered many calls to and visits by the Pierce County Sheriff's Department (hereinafter "PCSD"). CR 164 at RT 43-47, 61, 306-07, 371, 377-83. However when the group's misconduct escalated dangerously in the summer of

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[1] Herein Clerks Papers are referred to as "CR" followed by the applicable document number from the District Court Docket Sheet, Jury Instructions are referred to as "CR 146" -- the applicable document number -- followed by "Inst." and the pertinent instruction number, exhibits are referred to as "Ex." followed by the number given it in the District Court, and the reporter's transcript is referred to as "CR 164" -- the applicable document number -- followed by "RT" and the pertinent page number.

1992,[2] PCSD initiated a policy against any unit traveling to Herron Island alone after dark and even then there were always unresolved safety concerns. Id at 121, 126, 376-77, 669, 741-42, 744-45.

On the evening of September 6, 1992 -- Labor Day weekend -- PCSD received a hysterical telephone report by the wife of a Heron Island resident earlier threatened by the group in question that her family just had been threatened again by a member of a

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[2] On July 4th, a large hostile drunken crowd on the island's beach refused to extinguish a fire and by sheer weight of numbers forced a fire official and a PCSD deputy to retreat without enforcing the law. CR 164 at RT 47-48, 121-22, 266-69, 634-35, 743-44. On August 14, PCSD again responded when an island resident was threatened with a knife by a member of a loud party on the beach. Id at 51, 522-28, 661-65. The next day, on August 15, PCSD again was dispatched when many of the same persons involved in the July 4th incident retaliated against the victim of the knife threat by blaring radios at his home, yelling for him to move and shinning a spotlight into his windows. Id at RT 57-58, 123-24, 202-05, 308-10, 607-09, 638-39, 665-71, 745-50; Ex. 12 at 3.

drunken party at the beach. Id at RT 438-44, 530-33, 643-44, 673-75; Ex. 13 at 1. However the only available Deputies -- Thrash, Larson and Donnelly -- were not dispatched until PCSD learned from the fire district that "J.D." -- a member of this party -- had now threatened fire fighters who had attempted to extinguish an illegal fire. CR 164 at RT 10-11, 65, 129; Ex. 11; Ex. 13 at 2; Ex. A-29.

Upon arriving on the island, Deputy Thrash learned from a family on the beach that no one had left the group since the firemen had departed. CR 164 at RT 136, 759-60; Ex. 12 at 4. Approaching next the drunken group, which outnumbered the officers approximately four or five to one and which was made up of many of the same persons as those at previous calls, CR 164 at RT 34, 44, 58-60, 69, 136, 139-40, 273, 646, 676, 762; Ex. 12 at 4, Deputy Thrash repeatedly ordered those around the illegal

fire to leave. CR 164 at RT 27-28, 138, 286-88, 620, 647-48, 677-78, 759-60; Ex. 12 at 4; Ex. 14 at 2. When no one obeyed, Deputy Thrash called for J.D. to make himself known but was falsely told by members of the crowd that J.D. had left long ago. CR 164 at RT 28, 72-75, 289-93, 316-17, 547, 622-23; Ex. 10; Ex. 12 at 4; Ex. 13 at 2.

Knowing no one had left before his arrival, Deputy Thrash more forcefully told the drunken crowd he was "tired of this shit" and that the "party is over" but again frighteningly no one -- including plaintiff Herbert Gulliford -- obeyed. CR 164 at RT 28, 138, 140, 318-319, 764-766; Ex. 10; Ex. 12 at id; Ex. 13 at id. Instead they became increasingly "rebellious," a woman began to argue and Gulliford from the back of the crowd -- with the admitted intent of preventing J.D.'s arrest -- interrupted by yelling profanities and telling the deputies to "hop on the ferry -- go back."

CR 164 at RT 29, 76, 137, 141-44, 294-95, 321-25, 506-08, 515-19, 624-25, 766-68, 822-23; Ex. 10; Ex. 12 at id; Ex. 13 at id.; Ex. 14 at id.

Having no available back up,[3] Deputy Thrash in response to plaintiff's physical and now verbal refusal to obey a lawful order could 1) do nothing and let plaintiff's call incite the crowd to physically force the deputies off the island as it had before, 2) "hop" back on the ferry as he was told and abandon his duty to disperse the crowd, to arrest a felon and to assist firemen extinguishing the fire, or 3) arrest Gulliford for failing to disperse and obstructing so that the investigation could continue. CR 164 at RT 768, 770. Deputy Thrash chose to arrest plaintiff.

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[3] Reinforcement was unavailable because the island was isolated, personnel limited and broadcasts to the dispatcher difficult to send. CR 164 at 119-20, 122, 125-28, 533-37, 744-45; Ex. A-22.

Gulliford however ducked away and intentionally fell to a sitting position amidst his increasingly agitated friends, resisted being handcuffed for several minutes -- during which time he asked the hostile circling crowd for assistance -- but finally was overpowered and taken into custody. CR 164 at RT 79-81, 86, 114-15, 148-50, 161-62, 166, 218-19, 221, 303, 335-36, 338, 340-41, 408, 549-50, 553-54, 561, 569, 593-94, 596, 651, 695-702, 707-09, 717, 737, 778-80, 783-84, 786-88, 793, 801, 810-11, 815, 825; Ex. A-31.

Plaintiff thereafter filed suit under 42 USC § 1983 for unlawful arrest and excessive force but -- after a three week trial -- the jury returned a defense verdict on all issues. Gulliford v. Pierce County, 136 F.3d 1345, 1347 (9th Cir. 1998). Plaintiff then appealed to the Ninth Circuit Court of Appeals which unanimously affirmed the defense verdict on ex-

cessive force but in a split decision reversed the jury's verdict in favor of Deputy Thrash on unlawful arrest and remanded that issue for retrial. Id. Deputy Thrash now seeks a writ of certiorari.

V. ARGUMENT

1. THE FIRST AMENDMENT DOES NOT MAKE A SEIZURE ILLEGAL IF THERE IS PROBABLE CAUSE TO ARREST FOR PHYSICAL ACTS.

The evidence before the jury established Gulliford was arrested because he purposefully attempted -- by words and deeds -- to impede officers' attempts to perform their duties under tense and threatening circumstances. Before plaintiff said a word he had violated RCW 9A.84 .020 by failing to disperse when ordered to do so while congregating with a group of three or more and there had been acts of conduct within that group which created a substantial risk of causing injury to any person, or substantial harm to property.

CR 164 at RT 27-28, 138, 286-88, 316-19, 620, 647-48, 677-78, 759-60; Exs. 12-14. Plaintiff also thereafter "hindered, delayed or obstructed" the deputies under RCW 9A.76.020 because -- when Gulliford chose to remain and call out to the deputies -- the officers were attempting to disperse the crowd and arrest a suspect in a serious felony yet were being lied to by the crowd as it harbored the felon as well as being opposed by that crowd which had a known history of threatening behavior toward citizens and officials. Exs. 12-14.

Nevertheless, the jury's verdict in favor of Deputy Thrash on the claim of unlawful arrest was reversed and remanded for retrial because the Ninth Circuit held the jury should be instructed only "that under the First Amendment an individual cannot be arrested for mere speech unless the speech constitutes `fighting words'" and that "all that Gulliford did" was speak. Gulliford

v. Pierce County, 136 F.3d 1345, 1350 (9th Cir. 1998).[4] This published ruling -- making criminal conduct accompanying speech irrelevant to probable cause -- decides an important federal question vital to law enforcement that conflicts with decisions of both this Court and of the State of Washington. Supreme Court Rule 10(a) & 10(c).

Though Gulliford's words certainly had

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[4] The trial court's instruction explained the "First Amendment protects the right of citizens to verbally oppose **and /or** challenge police action without risking arrest...." CR 146, Inst. 15 (emphasis added). It thereby expressly distinguished "verbal opposition" from other "challenges" which are not "verbal opposition" but which may still be protected. The instruction then stated a person can be lawfully arrested if "that challenge" -- but not the previously distinguished "verbal opposition" -- takes the form of obstructing an officer. Id. Hence under the express terms of the instruction "verbal opposition" is absolutely protected and cannot be a basis for probable cause. Though this ignored that even words alone can constitute probable cause, 136 F.3d at 1350, such was only to plaintiff's benefit by depriving Deputy Thrash of this additional ground for upholding the arrest.

the potential to incite the mob,[5] case law makes clear speech can be a consideration for probable cause even where it does not constitute "fighting words" if it accompanies criminal conduct. In Houston v. Hill, 482 U.S. 451, 462 n. 11, 96 L. Ed.2d 398, 107 S.Ct. 2502 (1987), this Court indicated that "a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt[s] to engage the officer in conversation while the officer is directing traffic" or who "run[s] beside [an officer pursuing a felon] in a public street shouting

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[5] See e.g. United States v. Hoff, 22 F.3d 222, 224 (9th Cir. 1994)(Where -- among other things -- an officer was "outnumbered, exposed, isolated and confronted by a previously and increasingly uncooperative individual," that individual's refusal to leave a campsite and inducement of a dog tethered to a tree to growl at the officer was "[m]ore akin to the cocking of a trigger than to privileged speech" and like "the incitement of a mob to riot ..., thus fails to reach the constitutional threshold.")

at the officer." Similarly, Washington cases have held -- where the scene also was noisy and confused and a crowd angry -- that the First Amendment is not implicated when an individual's attempts to talk to officers about the arrest of another member of the party after being told to leave was conduct that hindered, delayed and obstructed the officers and interfered with the discharge of their duties in violation of RCW 9A.76.020. See State v. Lalonde, 35 Wn.App. 54, 61-62, 655 P.2d 421 (1983). Indeed, where a plaintiff was arrested because he consistently refused to comply with official directions and instead asked "why" he was being so directed, even the Ninth Circuit rejected a First Amendment challenge because incidental restrictions on freedom of speech are not invalid if the prohibited conduct contains both speech and non-speech elements and the law regulates the non-speech conduct. United States v.

Brice, 926 F.2d 925, 931 (9th Cir 1991). See also Cox v. Louisiana, 379 U.S. 536, 555, 13 L.Ed.2d 471, 85 S.Ct. 453 (1965) citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949)("it has never been deemed an abridgement of freedom of speech ... to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."); Mozzochi v. Borden, 959 F.2d 1174, 1179-80 (2nd Cir. 1992)(claim of retaliation for exercising free speech rejected where there was probable cause to believe a threat had been made); United States v. Gilbert, 813 F.2d 1523, 1529 (9th Cir.), cert. denied 493 U.S. 1082 (1987)(illegal conduct "is not protected by the First Amendment merely because the conduct was in part carried out by language in contrast to direct action."); Armes v. Philadelphia,

706 F. Supp. 1156, 1163 (E.D. PA 1989)(to succeed on a claim he was arrested for exercising free speech, plaintiff "must show [he] was arrested without probable cause.")

The Ninth Circuit's published decision here not only questions the enforceability of obstruction statutes in general but throws into confusion an officer's ability to arrest a suspect who is astute enough to accompany his illegal acts with verbal opposition to the arresting authority. Such harmful precedent has far reaching implications for both law enforcement and future claims under 42 U.S.C. § 1983.

2. CLEARLY ESTABLISHED STATE PRECEDENT REQUIRES QUALIFIED IMMUNITY

Qualified immunity exists where an officer's actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457

U.S. 800, 818, 73 L.Ed.2d 396, 102 S. Ct. 2727 (1982). See also Anderson v. Creighton, 483 U.S. 635, 641, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987). This defense exists because:

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials--like other officials who act in ways they reasonably believe to be lawful--should not be held personally liable.

Anderson, 483 U.S. at 641. To overcome this immunity a plaintiff must do more "than identify a clearly established legal test and then allege that the defendant has violated it" but "must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir.

1990)(emphasis added).

As previously noted, the majority on the Ninth Circuit panel held Gulliford's non-verbal actions before and during his accompanying verbal outburst were constitutionally irrelevant and that once plaintiff spoke Deputy Thrash could only have probable cause if plaintiff used "fighting words." In its summary analysis of qualified immunity,[6] the majority did not address the "prior law" of this Court in Hous-

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[6] The majority also opined Deputy Thrash had waived his right to assert qualified immunity because he "neglects to explain why it did not cross appeal on this issue from the district court's denial of its motion seeking qualified immunity" and that an "appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights." 136 F.3d at 1351. However, Deputy Thrash prevailed on all issues below so that his reassertion of qualified immunity on appeal was not made "with a view toward enlarging [his] own rights" but in light of the rule that a jury's verdict will be affirmed on any ground supported by the record. See United State v. Washington, 969 F.2d 752, 755 (9th Cir. 1992), cert. denied, 113 S. Ct. 1945 (1993).

ton v. Hill, 482 U.S. at 462 n. 11, or even its own precedent of United States v. Brice, 926 F.2d at 931, discussed and cited above, which demonstrate no reasonable officer would have believed it violated the constitution to make an arrest when a suspect's illegal physical act is accompanied by verbal opposition to police. In so doing, the Ninth Circuit majority committed the same error this Court identified in Anderson v. Creighton, 483 U.S. at 640-41:

> The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right [defendant] was alleged to have violated ... was clearly established. The Court of Appeals specifically refused to consider the argument that it was not clearly established that the circumstances with which [defendant] was confronted did not constitute probable cause ....

(Emphasis added). Under the federal precedent cited but ignored by the Ninth Circuit majority, Deputy Thrash had every reason to

believe plaintiff's "conduct in question" under the tense and threatening circumstances would be held to constitute a failure to disperse and to create a "clear and present danger" of preventing the deputies from dispersing the crowd and arresting a felon -- i.e. "a substantive evil" far greater than Hill's hypothetical impeding traffic and similar to its example of an appropriate obstructing arrest.

More immediately, Deputy Thrash's own state's decision in State v. Lalonde, 35 Wn.App. at 61-62, had been decided under similar facts as those here and would have led any reasonable Washington policeman to believe plaintiff's conduct of remaining and communicating both his intent to remain as well as his intent the deputies instead should leave, were "acts which accompanied his words." Hence any Washington policeman would believe Gulliford constitutionally could be arrested for failing to disperse

and attempting to obstruct their efforts to disperse the crowd and arrest a felon. However the majority refused even to discuss the Washington precedent cited it, presumably because the Ninth Circuit only considers state law "in the absence of binding precedent." See Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995); Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985).

Such ignores that Washington precedent is "binding" on Deputy Thrash and that under such an analysis the same action brought in state court would ignore circuit court precedent and inconsistently consider only what law was "clearly established" by state court decisions. See ASARCO Inc. v. Kadish, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989)(state courts "possess the authority ... to render binding judicial decisions that rest on their own interpretations of federal law"); Lockhart v. Fretwell, 506 U.S. 364, 375-76, 113 S.

Ct. 838, 122 L.Ed.2d 180 (1993)(THOMAS, J., concurring)("neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.") See also Arizonans for Official English v. Arizona, __ U.S. __, 137 L.Ed.2d 170, 117 S.Ct. 1055, 1076 n. 11 (1997)(Ninth Circuit's belief state courts are not "coordinate and co-equal with the lower federal courts on matters of federal law" deemed "remarkable.") If state precedent interpreting federal law is not considered in deciding what is "clearly established" -- regardless of which court a plaintiff chooses to decide his claim -- forum shopping will decide outcomes and qualified immunity will become meaningless because state officials then cannot "reasonably anticipate when their conduct may give rise to liability for damages...." C.f. Davis v. Sherer, 468 U.S.

183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984).

Though this Court has held a "court engaging in review of a qualified immunity judgment should therefore use its `full knowledge of its own [and other relevant] precedents,'" Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344(1994) quoting Davis v. Sherer, 468 U.S. at 192 n. 9(emphasis added), it has never specifically addressed the role state court precedent on federal questions has in analyzing whether a right is "clearly established" for purposes of qualified immunity. C.f. Harlow v. Fitzgerald, 457 U.S. at 819 ("we need not define here the circumstances under which `the state of the law' should be `evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."). But see O'Connor v. Donaldson, 422 U.S. 563, 577, 95 S.Ct. 2486, 45 L.Ed.

2d 396 (1975)(circuit court reversed because it "did not consider ... [defendant's] claimed reliance on state law" for purposes of qualified immunity). Though a federal appellate court has the ability to reconsider its precedent and interpret that of this Court, in analyzing qualified immunity it cannot ignore state precedent concerning federal questions which far more meaningfully and immediately govern a state official's conduct.

Because it has not been decided, but should be, what case law determines whether a right is "clearly established," certiorari should be granted to determine if a state officer is liable where he relies on his state's decisional law on federal constitutional rights. Sup. Ct. R. 10(c).

3. A JURY'S VERDICT SHOULD NOT BE REVERSED ON AN INSTRUCTIONAL ERROR NOT RAISED AT TRIAL.

As noted by the dissent, plaintiff at trial objected only to the absence of a se-

parate First Amendment claim and not -- as he later asserted on appeal -- that the court's instruction failed to state the First Amendment prevents verbal opposition from constituting probable cause under the Fourth Amendment. 136 F.3d at 1352-53 (O'Scannlain, dissenting); CR 167 at RT 3-4. Because a party may not object to an instruction on one ground at trial and rely on a different ground on appeal, Coastal Distributing Co v. NGK Spark Plug Co., 779 F.2d 1033, 1039 (5th Cir. 1986); Siegfried v. Kansas City Star Co., 298 F.2d 1, 7 (8th Cir. 1962), the issue was not properly before the Ninth Circuit. Fed.R.Civ.P. 51.

Though the majority opinion acknowledged "the precise articulation of Gulliford's First Amendment argument was not as artfully presented in his oral objection" to the District Court's instruction "as it was in his alternative jury instruction," 136 F.3d at 1349 n. 5, it concluded his

failure to properly object nevertheless comes within the "limited [useless formality] exception" to Civil Rule 51 where "(1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction." Id at 1620; Glover v. BIC Corp, 6 F.3d 1318, 1326 (9th Cir. 1993); United States v. Payne, 944 F.2d 1458, 1464 (9th Cir. 1991), cert. denied, 503 U.S. 975 (1992).

But, as the dissent observed, "apart from noting that Gulliford submitted an alternative instruction ..., the majority does not point to anything in the trial record to support its conclusion that the pointless formality exception to Rule 51 applies here."[7] 136 F.3d at 1353. The Ninth

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[7] As to whether "throughout the trial the party argued the disputed matter

Circuit previously held, and the Seventh still holds, the filing of an alternative instruction is not enough to comply with Rule 51 and preserve an issue for appeal. See Hebron v. Touhy, 18 F.3d 421, 424 (7th Cir. 1994); Gosvenor Properties Ltd v. Southmark Corp., 896 F.2d 1149, 1152-53 (9th Cir. 1990); Benigni v. Hemet, 879 F.2d 473, 475-76 (9th Cir. 1988).

More bothersome, plaintiff's statements to the trial court led it to affirmatively believe he had no objection to the language actually used in the instruction.

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with the court," the majority refers only to "additional discussions [that] occurred off the record in chambers," 136 F.3d 1349, but nothing indicates those off the record discussions included the issue raised on appeal. Rather, until now "remarks made by counsel in chambers ... and mere submission of proposed instructions did not clearly show that the issue was focused before the court." Gosvenor, id. As to the second requirement it be "clear from the record that the court knew the party's grounds for disagreement with the instruction," the record, as shown below, proves the opposite.

The entirety of plaintiff's assertions at trial regarding the instruction was that it "does not include a claim for a specific First Amendment violation ...." CR 162 at RT 2-3 (emphasis added). The trial court responded that though the "First Amendment is implicated," it "is my judgment that that is not a separate claim." Id. (emphasis added). After being told the trial court understood his objection only to be that he sought an additional "separate claim," plaintiff made no further comment on that instruction nor took exception to the rejection of his proposed alternative despite a specific request he do so. Id; CR 167 at RT 10. Thus plaintiff's comments misled the trial court into believing he had no objection to the language actually used in the court's instruction.

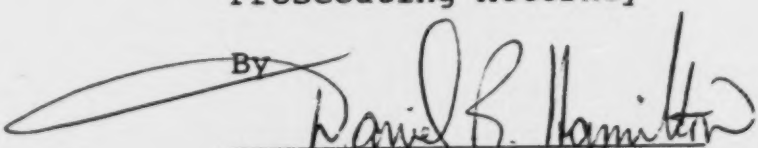
The division between the circuits on whether Rule 51 grants appellate courts such discretion to reach instructional

issues never before raised at trial, see 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2558, at 468 n. 14 (1994), a[illegible]e warrants certiorari. Supreme Court Rule 10(a).

VI. CONCLUSION

For the above reasons it respectfully is requested this Court grant certiorari.

JOHN W. LADENBURG
Prosecuting Attorney

By 

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Supreme Court, U.S.
FILED
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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1997

DEPUTY PAUL THRASH,

Petitioner,

v.

HERBERT GULLIFORD,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITIONER'S APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT GULLIFORD,
Plaintiff-Appellant,

v.

PIERCE COUNTY, a municipality and governmental subdivision of the State of Washington; JOHN SHIELDS, Sheriff of Pierce County; PAUL THRASH, individually and as Pierce County Deputy Sheriff; TERRILL LARSON, individually and as Pierce County Deputy Sheriff; P. DONNELLY, individually, and as Pierce County Deputy Sheriff,
Defendants-Appellees.

No. 96-35614
D.C. No.
CV-94-05658-RJB
OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
November 7, 1997—Seattle, Washington

Filed February 27, 1998

Before: Betty B. Fletcher and Diarmuid F. O'Scannlain,
Circuit Judges, and William W Schwarzer,* District Judge.

Opinion by Judge Fletcher; Partial Concurrence and
Partial Dissent by Judge O'Scannlain

*Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

SUMMARY

Civil Litigation and Procedure/Appeals

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that in a federal civil action, a legally correct proposed jury instruction may serve as an objection to the instruction actually given by the district court for the purpose of preserving the issue on appeal.

When deputies of appellee Pierce County, Washington's Sheriff's Department attempted to disperse a group of trespassers on a private island, appellant Herbert Gulliford suggested that the officers "hop on the ferry" and leave. One of the deputies, appellee Paul Thrash, placed Gulliford under arrest for obstructing a public servant in violation of Washington law. Two other deputies helped Thrash subdue Gulliford with pepper spray and the application of physical force when he passively resisted arrest.

No charges were ever filed against Gulliford. He brought a federal civil rights action against Thrash, the other deputies, Pierce County, and appellee Sheriff John Shields, alleging wrongful arrest and use of excessive force in violation of his First, Fourth, and Fourteenth Amendment rights.

At trial, the district court rejected Gulliford's proposed jury instruction on the issue of probable cause to arrest, which correctly stated that the First Amendment protects the right of citizens to verbally oppose and/or challenge police action, so long as it does not involve a threat or fighting words. The parties also discussed jury instructions off the record in chambers.

On the issue of probable cause to arrest, the district court gave Jury Instruction Number 15, which stated that a citizen has the right to verbally oppose and/or challenge police action

without risking arrest, so long as it does not "hinder, delay, or obstruct" a public servant in the discharge of the public servant's powers or duties. Gulliford objected to this instruction in open court. The court also gave Jury Instruction Number 14, which was based on federal law, and described the scope of an individual's limited right to resist an arrest made without probable cause.

The jury returned a defense verdict.

On appeal, Gulliford contended that Jury Instructions 14 and 15 were erroneous. He faulted Instruction 15 for failing to state that verbal protests or challenges to the police are permitted, even if they knowingly hinder, delay, or obstruct the police. Citing a Washington case, Gulliford asserted that Instruction Number 14 was improper because it was based on federal law, rather than the law of Washington State.

Pierce County countered that Gulliford was barred under Fed. R. Civ. P. 51 from attacking Instruction 15 on appeal, because he failed properly to object at trial by specifying the First Amendment's claimed effect on probable cause. Rule 51 provides that a party may not assign as error the giving or failure to give a jury instruction unless the party objects before the jury retires to begin deliberation, stating distinctly the matter objected to and the grounds of the objection. The County also contended that Thrash was entitled to qualified immunity on the wrongful arrest claim, and that all the deputies were entitled to qualified immunity on Gulliford's excessive force claim.

[1] It is the responsibility of litigants to ensure compliance with Rule 51, which the Ninth Circuit has interpreted "strictly." However, the Ninth Circuit has recognized a limited exception to the strict interpretation of Rule 51: where the district court is aware of the party's concerns with an instruction, and further objection would be unavailing, a futile formal objection will not be required. Such an objection is a

pointless formality when (1) throughout the trial the party argued the disputed matter with the court; (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction; and (3) the party offered an alternative instruction.

[2] Gulliford met the requirements of the "pointless formality" test. [3] Gulliford's proposed instruction was an accurate statement of the law that should have brought to the court's attention the failure of the general charge to adequately address the issue of probable cause. Such a proposed instruction would be sufficient despite the party's failure to object to the instructions as given. Not only did Gulliford propose an alternative instruction, he objected in open court to Instruction Number 15, albeit in less specific terms, and additional discussions regarding the jury instructions occurred off the record in chambers. The district court knew of Gulliford's grounds for disagreement. The proposed probable cause instruction served as an objection to the instruction given to the jury. As a result, Gulliford was not precluded from raising his objection to Instruction Number 15 on appeal.

[4] The First Amendment protects verbal criticism, challenges, and profanity directed at police officers unless the speech is shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. [5] Instruction Number 15 misstated the law, or at best was misleading, since it did not state that under the First Amendment an individual cannot be arrested for mere speech unless the speech constitutes "fighting words." Instruction 15 was impermissibly misleading, warranting reversal unless the error was harmless.

[6] In a civil case, if a jury instruction is erroneous, the court of appeal will reverse the judgment unless the error is more probably than not harmless. In this case, the jury more probably than not found that Deputy Thrash had probable cause to arrest Gulliford based on his words alone, because

that is all that Gulliford did—he spoke. The words were not "fighting words." Accordingly it was necessary to reverse and remand for a new trial.

[7] The Washington state case Gulliford cited states that a person being illegally arrested may use reasonable and proportional force to resist the arrest. This "reasonable and proportional" standard is to all appearances identical to the one in Instruction Number 14. **[8]** Accordingly, the district court did not err in instructing the jury under federal law rather than Washington State law with regard to Gulliford's claim that the arresting officers used excessive force.

[9] Pierce County neglected to explain why it did not cross-appeal from the district court's denial of qualified immunity from Gulliford's wrongful arrest and excessive force claims. **[10]** An appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights. **[11]** Even if Pierce County had cross-appealed, it did not appear that the district court erred in denying the officials qualified immunity.

Judge O'Scannlain dissented in part, concluding that the judgment should have been affirmed because Gulliford's trial objection to Instruction Number 15 did not address the issue of his Fourth Amendment right against arrest without probable cause.

COUNSEL

Joel Feldman, Lakewood, Washington, for the plaintiff-appellant.

Daniel Hamilton, Tacoma, Washington, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

Herbert Gulliford appeals the judgment entered following a jury trial in his 42 U.S.C. § 1983 action against Pierce County and various law enforcement officials alleging that his constitutional rights were violated when he was arrested for obstructing a public servant and resisting arrest. Gulliford contends that the district court erred in its instructions to the jury regarding his wrongful arrest and excessive force claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for a new trial.

I.

On the evening of September 6, 1992, a group of individuals were gathered around a fire on the north beach of Herron Island, a small privately owned island located just within the borders of Pierce County, Washington, west of Key Peninsula. At about 9:20 p.m. that night, the Pierce County Sheriff's Department ("PCSD") received a call that someone in the environs of the group had threatened a woman's family. About two hours later, the PCSD received a report that "J.D.", a member of the group gathered on the beach, had threatened a firefighter who attempted to extinguish the group's fire. In response, the three named deputy sheriffs, Thrash, Larson and Donnelly, were dispatched to the island to arrest J.D. and extinguish the fire.

Upon arriving on the island, the deputies were informed that J.D. had gone home. Deputy Thrash told the group, "This party is over, people," but none of the members left the beach. In response to Deputy Thrash's next statement that "I'm tired of this. This is a waste of government . . . ," Gulliford replied, "Then why don't you hop on the ferry, hop on the ferry and go back." Deputy Thrash then maneuvered through the crowd, grabbed Gulliford from behind, and placed him under arrest

for obstructing a public servant in violation of Wash. Rev. Code. § 9A.76.020.[1]

At this point, Gulliford intentionally fell to a sitting position and refused to comply with orders to stand and put his hands behind his back. The deputies grabbed Gulliford's arms, put him in a "hair hold," and placed a knee in his back. Although Gulliford did not kick out at or otherwise assault the officers, he continued passively to resist arrest. Deputies Larson and Donnelly then sprayed pepper spray in Gulliford's face. The deputies were eventually able to get one of Gulliford's wrists in handcuffs, and, after a second spraying in the face with pepper spray, Gulliford ceased resisting. Gulliford was additionally cited for resisting arrest pursuant to Wash. Rev. Code § 9A.76.040.[2]

Gulliford was taken to the Pierce County Jail and held there until he posted bond. The deputies never claimed that they thought that Gulliford was "J.D.", and no charges were ever filed against Gulliford. Gulliford contends that he suffered permanent injuries as a result of the officers' use of force in effecting the arrest.

Claiming that he was wrongfully arrested and that the deputies used excessive force in violation of his First, Fourth and Fourteenth Amendment rights, Gulliford filed this § 1983 action against Pierce County, Pierce County Sheriff John Shields, and, in their individual as well as official capacities, the three deputies, Thrash, Larson and Donnelly. The claims

[1]Wash. Rev. Code § 9A.76.020 provides in pertinent part: "Every person who . . . (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor."

[2]Wash. Rev. Code § 9A.76.040 provides: "(1) A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him. (2) Resisting arrest is a misdemeanor."

against Pierce County, however, were dismissed by stipulation of the parties on October 30, 1995.[3]

The case was tried for three weeks before an eight person jury, although the wrongful arrest claims as to Larson and Donnelly were dismissed on defendant's motion for a directed verdict and were never submitted to the jury. The jury returned verdicts for Deputy Thrash on the wrongful arrest claim and for all defendants on the excessive force claim.

II.

Gulliford contends that two of the instructions given to the jury were erroneous. "Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Chuman v. Wright,* 76 F.3d 292, 294 (9th Cir. 1996). When the alleged error is in the formulation of the instructions, the instructions are to be considered as a whole and an abuse of discretion standard is applied to determine if they are misleading or inadequate. *Masson v. New Yorker Magazine, Inc.,* 85 F.3d 1394, 1397 (9th Cir. 1996). However, when the claim is that the trial court misstated the elements that must be proved at trial, the reviewing court must view the issue as one of law and review the instruction de novo. *Fireman's Fund Ins. Cos. v. Alaskan Pride Partnership,* 106 F.3d 1465, 1469 (9th Cir. 1997).

A.

Jury Instruction Number 15 stated in pertinent part:

> The First Amendment protects the right of citizens to verbally oppose and/or challenge police action with-

[3]The references in this opinion to arguments by "Pierce County" refer to Pierce County Deputy Prosecuting Attorney Daniel R. Hamilton, who argued the instant appeal on behalf of the Pierce County Deputy Sheriffs.

> out risking arrest so long as that challenge does not knowingly hinder, delay, or obstruct any public servant in the discharge of the public servant's official powers or duties.

On appeal, Gulliford claims that his arrest for Obstructing a Public Servant was without probable cause. He contends that Jury Instruction Number 15 does not state a crime because verbal protests or challenges to the police are permitted, even if they knowingly hinder, delay or obstruct the police. To be criminal, the words must be fighting words. He makes the further point that § 9A.76.020, which prohibits hindering, delaying or obstructing a public servant, criminalizes conduct only, not words. He is correct.

As a preliminary matter, Pierce County argues that Gulliford is precluded from raising this issue on appeal because he failed to object properly at trial. Specifically, Pierce County contends that the record of Gulliford's exceptions to Jury Instruction Number 15 "is devoid of any mention of the First Amendment's claimed effect on probable cause . . . ."[4]

[1] Federal Rule of Civil Procedure 51 provides that "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." It is the responsibility of the litigants to ensure compliance with FRCP 51, and we have generally interpreted that rule "strictly." *McGonigle v. Combs,* 968 F.2d 810, 823 (9th Cir.), *cert. dis-*

[4]Pierce County asserts that the entirety of Gulliford's argument to the District Court regarding Jury Instruction Number 15 was as follows:

> It does not include a claim for specific First Amendment violation, and as we indicated in our trial brief and in discussion previously with the court, we believe that both the First Amendment and the Fourth Amendment are implicated and that a violation of either would give rise to a cause of action.

missed, 506 U.S. 948 (1992). However, we have recognized "a limited exception" to the strict interpretation of FRCP 51: " 'Where the district court is aware of the party's concerns with an instruction, and further objection would be unavailing, we will not require a futile formal objection.' " *Id.* (citation omitted). Specifically, we have held that such an objection is a pointless formality " 'when (1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction.' " *Glover v. BIC Corp.,* 6 F.3d 1318, 1326 (9th Cir. 1993) (quoting *United States v. Payne,* 944 F.2d 1458, 1464 (9th Cir. 1991), *cert. denied,* 503 U.S. 975 (1992)).

[2] Gulliford meets the requirements of the "pointless formality" test. The instruction he proposed (No. 31) stated:

> Defendants claim that they had probable cause to arrest plaintiff for obstructing a police officer in the conduct of his lawful duties. The First Amendment protects the right of citizens to verbally opposed and/ or challenge police action so long as that challenge does not involve a threat or fighting words.
>
> * * *
>
> *City of Houston v. Hill,*
> 482 U.S. 451, 462, 107 S.Ct. 2502, 2510 (1987)

[3] As in *Glover v. BIC Corp.,* Gulliford's proposed instruction was an "accurate statement[ ] of the law which should have brought to the court's attention the failure of the general charge to adequately address the issue of" probable cause. 6 F.3d at 1327. In *Glover,* we held that such a proposed instruction was sufficient despite the party's failure to object to instructions as given. *Id.* Here, in contrast to *Glover,* not only did Gulliford propose an alternative jury instruction, he

also objected in open court to Jury Instruction Number 15, albeit in less specific terms, and the parties concede that additional discussions regarding the jury instructions occurred off the record in chambers.[5] We are thus satisfied that the district court knew of Gulliford's grounds for disagreement, and that, on the instant record, the "proposed [probable cause] instruction[ ] will serve as an objection to the instructions given the jury." *Id.*; *cf. United States v. Payne*, 944 F.2d 1458, 1463-64 (9th Cir. 1991), *cert. denied*, 503 U.S. 975 (1992) (specific objection not a "pointless formality" where it was clear from the record that failure to give a presumption of innocence instruction was due to simple oversight and counsel failed to alert the court to the omission when it pointedly asked whether there were any objections to the instructions read to the jury). As a result, Gulliford is not precluded from raising on appeal his objection to Jury Instruction Number 15.[6]

---

[5]Pierce County cites *Benigni v. City of Hemet*, 879 F.2d 473, 475-76 (9th Cir. 1988), for the proposition that, notwithstanding Gulliford's proposed alternative jury instruction, his objection was not properly preserved because "the trial court was not made aware of any specific concern with the proposed instructions." However, unlike Gulliford, the litigant in *Benigni* made no oral objection or argument whatsoever at trial. *Id.* at 476. Pierce County concedes that Gulliford by contrast did make an oral objection to Jury Instruction Number 15 specifically regarding the First Amendment. Although the precise articulation of Gulliford's First Amendment argument was not as artfully presented in his oral objection as it was in his alternative jury instruction, it was sufficient to give the court "an opportunity to modify the instruction and incorporate the elements of the . . . proposed instructions." *Id.*

[6]Judge O'Scannlain's partial dissent suggests that this case is controlled by *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152-53 (9th Cir. 1990), in which we held that Southmark failed to comply with the requirements of FRCP 51 notwithstanding the fact that Southmark offered an alternative jury instruction. *See* infra at 1626, 1629–30. However, in contrast to the instant case, the alternative jury instruction in *Grosvenor* failed "to state distinctly the matter objected to and the ground of the objection as required by Rule 51." 896 F.2d at 1153. Gulliford's proposed jury instruction, on the other hand, precisely articulated the matter objected to and the grounds of the objection, much like the alternative

[4] The Supreme Court has consistently held that the First Amendment protects verbal criticism, challenges, and profanity directed at police officers unless the speech is " 'shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.' " *City of Houston, Texas v. Hill,* 482 U.S. 451, 461-63 (1987) (quoting *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949)); *see also Lewis v. City of New Orleans,* 415 U.S. 130, 132-134 (1974).

In *Hill,* a case with facts substantially similar to those before us, the appellee shouted at police officers who had approached his friend to "pick on somebody your own size." *Id.* at 454. Hill was arrested under a city ordinance that prohibited "oppos[ing], molest[ing], abus[ing] or interrupt[ing] any policeman in the execution of his duty." *Id.* at 455. Although Hill was acquitted, he brought an action seeking to strike the ordinance as unconstitutional on its face. *Id.* The Supreme Court agreed, emphasizing that "[t]he Constitution does not allow such speech to be made a crime," and that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63.

Similarly, in *Lewis v. City of New Orleans,* as later recounted in *Hill,* the appellant yelled obscenities at an officer who had asked appellant's husband to produce his driver's license. *Id.* at 461. Lewis was convicted under a municipal ordinance that made it a crime "for any person wantonly to curse or revile or to use obscene or opprobious language

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instruction in *Brown v. Avemco Inv. Corp.,* 603 F.2d 1367 (9th Cir. 1979), cited with approval in *Grosvenor,* 896 F.2d at 1153. As we noted in *Grosvenor,* the plaintiff in *Brown* adequately complied with the requirements of FRCP 51 because his proposed instruction was sufficiently clear to focus the issue for the jury. *See id.*

toward or with reference to any member of the city police while in the actual performance of his duty." *Lewis,* 415 U.S. at 132. The Supreme Court vacated the conviction and invalidated the ordinance as facially overbroad, explaining that the ordinance was not limited in scope to "fighting words" that " 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.' " *Id.* at 133 (quoting *Gooding v. Wilson,* 405 U.S. 518, 525 (1972)).

Relying, *inter alia,* on the Supreme Court's decision in *Hill,* we ruled in *Mackinney v. Nielsen* that expressive conduct such as writing with chalk on the sidewalk does not itself create probable cause for arrest, and that verbally protesting an officer's order to stop writing is protected by the First Amendment. *See* 69 F.3d 1002, 1007-08 (9th Cir. 1995). The decision in *Mackinney* also relied on *Duran v. City of Douglas,* in which we emphasized that "criticism of the police is not a crime," and that "while police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful but protected by the First Amendment." 904 F.2d 1372, 1377, 1378 (9th Cir. 1990).

[5] The facts before us are indistinguishable from those in *Hill* and its progeny. If anything, Gulliford's suggestion that Deputy Thrash "hop on the ferry"[7] is less provocative than the

[7]Pierce County contends that Gulliford's statement included profanity. However, the testimony of the PCSD deputies is somewhat inconsistent on this point. Deputy Thrash wrote in his report that Gulliford said "Then why don't you get the fuck off the island." Deputy Donnelly wrote in his report that "A person on the far side of the fire said why don't you leave the fuckin[g] island. [Deputy Thrash] walked around the fire and grabbed Mr. Gulliford from behind and pulled him over backwards." Finally, Deputy Larson wrote that "Thrash told them to leave and told them we were tired of coming over to stop these problems, no one moved and a male voice to my right said something to the effect of 'Then get the hell off the island.' Thrash walked over and grabbed the only male around, he had been crouching down between two women when he said it. Thrash told him he was under arrest . . . ." In any event, whether Gulliford may have used profanity does not affect the analysis.

"opprobious language" found in those cases. Jury Instruction Number 15 misstates the law or is at best misleading since it does not state that under the First Amendment an individual cannot be arrested for mere speech unless the speech constitutes "fighting words." *See Hill,* 482 U.S. at 465-67; *see also Mackinney,* 69 F.3d at 1007-08; *Duran,* 904 F.2d at 1377-78. We agree that Jury Instruction Number 15 was impermissibly misleading, warranting reversal unless the error was harmless.

[6] In a civil case, "[i]f a jury instruction is erroneous, we will reverse the judgment unless the error is more probably than not harmless." *Chuman v. Wright,* 76 F.3d 292, 294 (9th Cir. 1996). Here, the jury more probably than not found that Deputy Thrash had probable cause to arrest Gulliford based on his words alone because that is all that Gulliford did—he spoke. As a matter of law, the words spoken were not "fighting words." Accordingly, we reverse and remand for a new trial on this claim.

B.

Jury Instruction Number 14 stated:

> An individual has a limited right to offer reasonable resistance to an arrest made without probable cause, but only if the arrest is the product of the officer's bad faith, provocative conduct, or personal frolic. In such a case, the amount of force used to resist an unlawful arrest must be reasonable and proportioned to the injury attempted upon the arrestee.

On appeal, Gulliford argues that this jury instruction was erroneously based on federal law rather than Washington State law.

[7] The objection is not well taken. We need not go beyond the observation that the Washington law on this point is substantially indistinguishable from the federal law. The Wash-

ington state case quoted by Gulliford states that a "person being illegally arrested may use reasonable and proportional force to resist the arrest." *State v. McCrorey,* 851 P.2d 1234 (Wash. Ct. App. 1993) (citing *State v. Hornaday,* 713 P.2d 71 (Wash. 1986)). This "reasonable and proportional" standard is to all appearances identical to the one found in Jury Instruction 14.

[8] Accordingly, the district court did not err in instructing the jury under federal rather than Washington State law with regard to Gulliford's claim that the arresting officers used excessive force.

III.

[9] Pierce County argues on appeal that Deputy Thrash is entitled to qualified immunity from Gulliford's wrongful arrest claim and that all of the deputies are entitled to qualified immunity from Gulliford's excessive force claim. However, Pierce County neglects to explain why it did not cross-appeal on this issue from the district court's denial of its motion seeking qualified immunity.

[10] As we recently reiterated, "[a]n appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights." *Spurlock v. FBI,* 69 F.3d 1010, 1018 (9th Cir. 1995) (citing *Turpen v. City of Corvalis,* 26 F.3d 978, 980 (9th Cir.), *cert. denied,* 513 U.S. 963 (1994)).

[11] Moreover, even if Pierce County had cross-appealed, it does not appear that the district court erred in denying the officials qualified immunity. As we explained in *Mackinney v. Nielsen,* "the Supreme Court instructed courts ruling on qualified immunity to examine whether the 'contours of the right' at stake in the action are sufficiently clear so that a reasonable official could understand that he or she is violating

the right." 69 F.3d 1002, 1006-07 (9th Cir. 1995). We ultimately concluded in that case that

> Police officers have a difficult job, and they deserve the respect of their community. But they in turn must respect the right of individuals in that community to question their government and the role of the police. A reasonable officer should have known that Mackinney was simply exercising that right.
>
> *Id.* at 1007.

AFFIRMED in part, REVERSED in part, and REMANDED for a new trial. Appellee to bear costs.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part.

I would affirm the judgment of the district court. Regrettably, I cannot join Section II.A's discussion of the jury instruction on verbal opposition to police action, which, in my view, threatens "[t]his court['s] . . . reputation as the strictest enforcer of Rule 51," *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991), and creates a direct intra-circuit conflict with *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149 (9th Cir. 1990). Therefore, I respectfully dissent and would not reach the question of qualified immunity, which the majority discusses in Part III.

I

Federal Rule of Civil Procedure 51 states:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict,

> *stating distinctly* the matter objected to and *the grounds of the objection.*

Fed. R. Civ. P. 51 (emphasis added). Our court has "interpreted this rule strictly and ha[s] stated that, '[i]n a civil case, we may not review a jury instruction in the absence of a proper objection.' " *McGonigle v. Combs,* 968 F.2d 810, 823 (9th Cir. 1992) (quoting *Larez v. City of Los Angeles,* 946 F.2d 630, 638 (9th Cir. 1991)); *see also* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558, at 674 (1971) ("[T]he Ninth Circuit stands alone in reading Civil Rule 51 literally and denying that there is any power to reverse for plain error in an unobjected-to instruction in a civil case.") The party objecting to the instruction must bring "into focus *the precise nature* of the alleged error in the district court's instruction." *McGonigle,* 968 F.2d at 824 (emphasis added).

Gulliford now argues that he was arrested for obstructing a police officer without probable cause in violation of the Fourth Amendment. He does not claim on appeal that his First Amendment right verbally to hinder, delay, or obstruct the police was also violated.

Gulliford correctly argues before this court that jury instruction 15[1] was flawed because it failed to inform the jury that the police lacked probable cause to arrest him for speech that "knowingly hinder[ed], delay[ed], or obstruct[ed]" the police but did not include "fighting words [ ]or . . . obscene or opprobrious language." *Houston v. Hill,* 482 U.S. 451, 461 (1987). Gulliford's objection to jury instruction 15 at trial rested on an entirely different ground. Gulliford's argument was as follows:

---

[1]Jury instruction 15 stated:

> The First Amendment protects the right of citizens to verbally oppose and/or challenge police action without risking arrest so long as that challenge does not knowingly hinder, delay, or obstruct any public servant in the discharge of the public servant's official powers or duties.

> [The instruction] does not include a claim for a specific First Amendment violation, and as we indicated in our trial brief and in discussions previously with the court, we believe that both the First Amendment and the Fourth Amendment are implicated and that a violation of either would give rise to a cause of action.

In other words, Gulliford argued at trial that instruction 15 did not separately address his (now abandoned) claim that his First Amendment rights had been violated as well. Gulliford's (perhaps incorrect) argument was that the instruction *was exclusively concerned with* his Fourth Amendment claim — not that the instruction *misstated the elements of* that claim.

Of course, the contours of Gulliford's Fourth Amendment claim are shaped both by Wash. Rev. Code § 9A.76.020 — the Washington statute that prohibits obstruction of law enforcement officers — and by the First Amendment. Section 9A.76.020 provides: "Every person who . . . (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor." Meanwhile, the First Amendment gives individuals the right to verbally obstruct public servants as long as they do not use "fighting words [ ]or . . . obscene or opprobrious language." *Houston v. Hill,* 482 U.S. 451, 462 (1987). Viewed in conjunction with Wash. Rev. Code § 9A.76.020, the First Amendment helps to define Gulliford's right under the Fourth Amendment not to be arrested for obstructing the police without probable cause.

However, Gulliford's objection at trial to jury instruction 15 had nothing to do with his rights under the Fourth Amendment. Rather, Gulliford wanted the district court to instruct the jury *separately* regarding an alleged violation of his First Amendment right to verbally obstruct police officers. Because Gulliford failed to "*stat[e] distinctly* the matter objected to and the grounds of [his] objection [at trial]," Fed. R. Civ. P.

51 (emphasis added), he is precluded from raising his Fourth Amendment argument on appeal.

II

The majority invokes the "pointless formality" exception to Rule 51. As we explained in *United States v. Payne,* 944 F.2d 1458 (9th Cir. 1991), "an objection may be a 'pointless formality' when (1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction." *Id.* at 1464.

It is undisputed by the parties that Gulliford offered an alternative instruction. Gulliford has failed to demonstrate, however, either that "throughout the trial [he] argued the disputed matter with the court," or that "*it is clear from the record* that the court knew [Gulliford's] grounds for disagreement with the instruction." *Id.* (emphasis added). Apart from noting that Gulliford submitted an alternative instruction (thereby satisfying only the third element of the pointless formality test), the majority does not point to anything in the trial record to support its conclusion that the pointless formality exception to Rule 51 applies here.

In *Grosvenor Properties Ltd. v. Southmark Corp.,* 896 F.2d 1149 (9th Cir. 1990), the defendants submitted an alternative jury instruction that was rejected by the district court. *See id.* at 1152. At a sidebar conference called to consider the instructions, the defendants stated that their proposed instruction had not been given. *See id.* The district court responded that it had rejected the instruction and that it was unnecessary for counsel to repeat previously submitted instructions or objections. *See id.* We held that such a "sequence of events is not sufficient to constitute a sufficient objection to the instructions that were given, as Rule 51 is applied in this circuit." *Id.* If the defendants in *Grosvenor* did not succeed in

preserving their objection despite complaining that their proposed instruction had not been given, then certainly Gulliford, who did nothing to call attention to the district court's rejection of his instruction, failed to preserve his objection.

In an attempt to distinguish *Grosvenor,* the majority relies upon a sentence from that opinion. *See* Majority Opinion at 1621 n.6 ("However, in contrast to the instant case, the alternative jury instruction in *Grosvenor* failed 'to state distinctly the matter objected to and the ground of the objection as required by Rule 51.' ") (quoting *Grosvenor,* 896 F.2d at 1153). The relevant passage in *Grosvenor,* however, states, in full:

> Southmark argues that it made the required specific objection to the instruction that failed to state that termination of the joint venture would end fiduciary duty, and that it submitted alternative theories of liability to the jury by way of special verdict questions. It contends that it did so by its submission of proposed jury instruction 22. In addition, at a sidebar conference called to consider corrections and additions to the instructions, Southmark's counsel stated that instruction 22 had not been given and the court responded that it had rejected that instruction. At that same conference the court noted that it was not necessary for counsel to repeat previously submitted instructions or objections.
>
> *However, this sequence of events is not sufficient to constitute a sufficient objection to the instructions that were given, as Rule 51 is applied in this circuit.* This court has held that remarks made by counsel in chambers, discussion of law in pretrial memoranda and mere submission of proposed instructions did not clearly show that the issue was focused before the court.

> *In addition,* an examination of proposed instruction 22 suggests that it was not sufficient to state distinctly the matter objected to and the ground of the objection as required by Rule 51.

Id. at 1152-53 (internal citations omitted). As the above passage demonstrates, our *holding* in *Grosvenor,* that a "sequence of events" which includes the submission of an alternative jury instruction does not "constitute a sufficient objection to the instructions that were given," did not turn on whether that alternative instruction "state[d] distinctly the matter objected to and the ground of the objection." *Id.* Although we observed ("addition[ally]") in *Grosvenor* that the alternative instruction was unclear, *id.* at 1153 (citing *Brown v. Avemco Inv. Corp.,* 603 F.2d 1367, 1371 (9th Cir. 1979)), the clarity of the alternative instruction was irrelevant to *Grosvenor*'s analysis of the "sufficien[cy]" of the relevant "sequence of events." *Id.* at 1152. Far from distinguishing *Grosvenor,* the majority's discussion of that case demonstrates why the majority opinion is in direct conflict with it.

I respectfully dissent.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT GULLIFORD Plaintiff-Appellee, v. PIERCE COUNTY, a municipality and governmental subdivision of the State of Washington JOHN SHIELDS, Sheriff of Pierce County; PAUL THRASH, individually and as Pierce County Deputy Sheriff; TERRILL LARSON, individually and as Pierce County Deputy Sheriff; P. DONNELLY, individually, and as Pierce County Deputy Sheriff, Defendants-Appellees.	)	No. 96-35615 D.C. No. CV-94-05658-RJB ORDER

Before: FLETCHER and O'SCANNLAIN, Circuit Judges, and SCHWARZER,* District Judge.

Judges Fletcher and Schwarzer vote to deny the petition for rehearing.

Judge O'Scannlain would grant rehearing.

Judge Fletcher votes to deny the

Appendix "B"

suggestion for rehearing en banc and Judge Schwarzer so recommends. Judge O'Scannlain would grant the rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

* Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

CONSTITUTIONAL PROVISIONS AND STATUTES

I. **U.S. Const. Amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. **U.S. Const. Amend. IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

III. **42 U.S.C. § 1983:**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IV. **RCW 9A.76.020 Obstructing a law enforcement officer.**

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, and other

public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor. [1995 c 285 § 33; 1994 c 196 § 1; 1975 1st ex.s. c 260 § 9A.76.020.]

V. **RCW 9A.84.020 Failure to disperse.**

(1) A person is guilty of failure to disperse if:

(a) He congregates with a group of three or more other persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person, or substantial harm to property; and

(b) He refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing or executing the law.

(2) Failure to disperse is a misdemeanor. [1975 1st ex.s. c 260 § 9A.84.020.]

Supreme Court, U.S.
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No. 97-2082

In The

Supreme Court of the United States

October Term, 1997

DEPUTY PAUL THRASH,

Petitioner,

v.

HERBERT GULLIFORD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Respondent, Herbert Gulliford, opposes the petition of Deputy Paul Thrash for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

STATUTES INVOLVED

It should be noted that the text of the Revised Code of Washington § 9A.76.020 (hereinafter RCW 9A.76.020), as provided to this Court by the Petitioner, is *incorrect*. (Pet. App. C. IV.) Petitioner cites the 1995 version of the statute, which is substantially different from the 1975 version in place at the time of this incident in 1992:

> "**9A.76.020 Obstructing a public servant.** Every person who, (1) without lawful excuse shall refuse or knowingly fail to make or furnish any statement, report, or information lawfully required by him by a public servant, or (2) in any such statement or report shall make any knowingly untrue statement to a public servant, or (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor." (1975 1st ex.s. c 260 § 9A.76.020)[1]

[1] Sections 1 and 2 of the statute had been found to be unconstitutional by the Washington State Supreme Court in *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982), ten years before Mr. Gulliford was arrested. Mr. Gulliford was arrested for violation of Section 3 of the statute.

STATEMENT OF THE CASE

Petitioner Thrash has attempted to re-write the facts of this case, using more than six pages to do so. Because Petitioner's Questions 1 and 2, as posed to this Court, are based upon his misrepresentations of these facts, it is necessary to review what actually happened on Herron Island.

Deputy Thrash, as he tried to do at the appellate level, attempts to disparage Mr. Gulliford by citing a plethora of incidents which occurred weeks or months before the incident in question, involving other people when Mr. Gulliford was not present, and frequently, incidents which occurred when Mr. Gulliford was not even in the State of Washington. The accuracy of the representations of these incidents will not be debated, as they are irrelevant to the instant case.

Petitioner continues to insist that Mr. Gulliford "fail[ed] to disperse." (Pet. 5.)

Deputy Thrash completely neglects to mention that the entire episode was recorded on videotape with sound recording.[2] (Ex. 10.) In reaching their decision, the Court of Appeals had access to Exhibit 10, and viewed it before hearing oral arguments in the case.

Ex. 10 shows that the first order to disperse was issued after Mr. Gulliford was already on the ground, pulled down from behind by Deputy Thrash. Deputy

---

[2] The videographer, Curt Bray, an island teenager and Eagle Scout, was also arrested for Obstructing A Public Servant that night, but was also never charged with a crime. (Exs. 10 and 12.)

Terrill Larson yelled, "Disperse, disperse, that's *once*, you've been warned." Mr. Gulliford was already under arrest at that time, face down in the beach sand with Deputy Thrash on top of him, kneeing him in the neck. (Ex. 10.)

Thrash further neglects to mention that Mr. Gulliford had no part in the events earlier on the day in question. There are no allegations in any of the evidence that Mr. Gulliford did anything other than to arrive at the community beach shortly before the deputies did.

The deputies were looking for a man named J.D. After arresting (and apparently un-arresting) a Mr. Petersen – the wrong person, Deputy Thrash addressed the crowd, cursing at them and telling a woman who spoke to "Shut up, just shut up!" (Ex. 10.)

As Deputy Thrash lectured this group of mostly middle-aged people, and in response to Thrash's statement, "This is a waste of government . . . ,", Gulliford responded in a conversational tone, "Then why don't you hop on the ferry, hop on the ferry and go back." (Ex. 10. *See also Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998) at page 1347.)

In the words of Deputy Patrick Donnelly, "U 147 [Thrash] walked around the fire and grabbed Mr. Gulliford from behind and pulled him over backwards." (Ex. 13.)

Each of the deputies agree that Mr. Gulliford never moved, opened his mouth to express his opinion in a single sentence, and was immediately arrested. (Exs. 10, 12, 13 and 14. An accurate summary of the pertinent parts

of the police reports can be found in *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998) at n. 7.)

Petitioner refers to the "rebellious" (Pet. 5), "drunken" (Pet. 4), "agitated" (Pet. 7), "disturbing the peace" (Pet. 2), "threatening" (Pet. 2), "large" (Pet. 3, n. 2), "hostile" (Pet. 3, n. 2), crowd.

Ex. 10 shows a group of approximately fifteen people, some as old as 70, none of whom was armed, none of whom made a physical move toward the deputies, and none of whom was threatening the officers.

In actual fact, the most threatening behavior presented that night occurred when the officers were physically beating Mr. Gulliford, and this crowd of mostly middle-aged people shouted promises to call their respective lawyers in the morning. (Ex. 10.) Perhaps a frightening thought, but certainly not a crime.

Petitioner states that there were only three "available Deputies" (Pet. 4) to respond to the call, and that the officers were outnumbered "four or five to one[.]" In addition to the three Pierce County Sheriff's Deputies, a Washington State Patrol Trooper and three members of Pierce County Fire District #16 were also at the scene. Two more firefighters were standing by the fire engine, one-half block away.

Thrash specifically states (Pet. 5) that Mr. Gulliford had an "admitted intent of preventing J.D.'s arrest[.]" *Nothing* in the record reflects that Mr. Gulliford wished or intended or attempted, in any way, to *prevent* J.D.'s arrest. The citations listed by Thrash to support this accusation are devoid of evidence that the assertion is true.

In fact, J.D. was never arrested (that night or at a later date), neither Mr. Gulliford nor videographer Bray was ever charged with a crime, much less convicted of one, and even the beachfire which seemed to be of such concern was allowed to burn itself out the next day. (Exs. 16b, 16c and 16d.)

REASONS FOR DENYING THE WRIT

I.

WHETHER PROTECTED SPEECH SHIELDS PHYSICAL CRIMINAL ACTS NEED NOT BE DECIDED IN THIS MATTER

A. The Issue Of Whether Protected Speech Shields Otherwise Unlawful Physical Acts Has Repeatedly Been Decided

Petitioner asks whether speech, if it is uttered after a suspect physically commits a crime, shields the speaker from arrest.

As the long history of established case law demonstrates, this question has already been decided over and over again. (*E.g., Wisconsin v. Mitchell*, 508 U.S. 476 (1993); *U.S. v. Brice*, 926 F.2d 925, 931 (9th Cir. 1991); *U.S. v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987); *Cox v. Louisiana*, 379 U.S. 536 (1965.)) Speech does not shield physical crimes.

B. As No Physical Acts Occurred In This Matter, The Issue Is Irrelevant

Mr. Gulliford never performed *any* physical acts, much less a physical act which constituted a crime.

> "Here, the jury more probably than not found that Deputy Thrash had probable cause to arrest Gulliford based on his words alone because that is all Gulliford did – he spoke." *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998) at 1350.

After a three week trial, the District Court made the same finding, stating in Jury Instruction Number 15, in pertinent part:

> "You should not consider whether there was probable cause to arrest for *other crimes* in making the determination of whether there was probable cause to arrest." (Jury Instruction Number 15, paragraph 3.) (Emphasis added.)

Petitioner cites dicta from a footnote to *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-63 (1987) to support his case. (Pet. 11.) Yet even this footnote dicta supports Mr. Gulliford's position. He did not run alongside an officer chasing a fleeing felon, or persistently try to engage an officer in conversation who was attempting to direct traffic at a busy intersection. Mr. Gulliford never moved, verbally expressed his opinion in a single sentence, and was arrested.

Nowhere in his Petition (other than a brief reference at n. 4 (Pet. 10)) does the Petitioner address the finding of the Court of Appeals that Jury Instruction Number 15 was an inaccurate statement of the law. Nor does the

Petitioner seriously argue that the decision, which found that the instruction "misstates the law or is at best misleading", is incorrect. *Gulliford v. Pierce County*, 136 F.3d at 1350.

At n. 4 (Pet. 10), Thrash contends that, by separating Jury Instruction Number 15 into partial sentences, it can be interpreted to state that verbal opposition is always protected by the First Amendment, but other "non-verbal" challenges can be probable cause for arrest.

This tortured interpretation of the jury instruction was first advanced at the end of oral arguments before the Court of Appeals. The relegation of this contention to a footnote in the Petition accurately reflects its legal import. The Petitioner cannot seriously be asking this Court to split a sentence in half, and interpret it to infer precisely the opposite of its obvious meaning.

The Petitioner has sought to have this Court decide a manufactured question, not reflected by the facts of this case, and one which has nothing to do with the proper finding of the Ninth Circuit Court of Appeals.

II.

QUALIFIED IMMUNITY IS NOT AT ISSUE IN THIS MATTER

A. Qualified Immunity Is Not Properly Before This Court

The Petitioner almost completely ignores the ruling of the Court of Appeals – that the issue of qualified immunity was not properly before the Court as the

Appellees failed to cross-appeal from the District Court's denial of qualified immunity for the deputies.

The Petitioner addresses this ruling only in a single paragraph in a footnote to his brief. (Pet. 16 at n. 6.) With apparent arrogance, Petitioner states that because he prevailed at the trial court level (using the improper and incorrect jury instruction), the Appellees did not believe it was necessary to appeal the denial of their petition for qualified immunity.

Yet substantial case law supports the ruling of the Court of Appeals. *Spurlock v. F.B.I.*, 69 F.3d 1010, 1018 (9th Cir. 1995), ("[A]n appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights.) *See also Turpen v. City of Corvallis*, 26 F.3d 978, 980 (9th Cir.), *cert. denied*, 513 U.S. 963 (1994); *Housing Auth. v. Ponca City*, 952 F.2d 1183, 1195 (10th Cir. 1991), ("An appellee may present an argument on appeal only if it does not enlarge the rights conferred by the original judgment."); *Texas Commerce Bank Nat. Ass'n. v. National Royalty Corp.*, 799 F.2d 1081, 1083 (5th Cir. 1986), (Appellee who failed to file cross-appeal could not attack judgment with view toward enlarging rights.)

The question of qualified immunity is not properly before the Supreme Court, as it was not properly before the Court of Appeals.

B. Qualified Immunity Does Not Protect Officers From Behavior Which Is Clearly Established To Be Unconstitutional

Assuming arguendo that the Petitioner's procedural problems are overlooked by this Court, Petitioner poses an interesting question: whether police following state court precedent are entitled to qualified immunity, even if the federal court interprets the same provision differently.

However, this question has no relation at all to the matter at bar. The state court precedent, *State v. Lalonde*, 35 Wn.App. 54, 61-62, 665 P.2d 421 (1983), is identical to the federal precedents, including *Mackinney v. Nielsen*, 69 F.3d 1002 (9th Cir. 1995); *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1994); *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-63 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 132-134 (1974); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); and so many others.

Contrary to Petitioner's representation, in *Lalonde* the officers had already been physically attacked twice by other party-goers. Lalonde persisted in physically approaching the officers, was repeatedly told to get back, was physically *pushed* back, and when he physically approached yet again, was arrested.

In upholding a guilty verdict against Mr. Lalonde for Obstructing a Public Servant, the Washington State Court of Appeals wrote in *State v. Lalonde*, 35 Wn.App. 54, 665 P.2d 421 (1983) at page 61: "Lalonde's offense did not arise from his speech, but from the acts which accompanied his words."

Even while refusing to examine the issue of qualified immunity because of Appellees' failure to cross-appeal, the Court of Appeals noted that the right to verbally question the actions of police was "sufficiently clear" so that a reasonable officer could understand that he or she was violating the right. *Gulliford v. Pierce County*, 136 F.3d at 1351.

Petitioner cites *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), yet *Anderson*, supra, specifically concurs with *Gulliford v. Pierce County*, supra:

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, [citations omitted,] but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

Pre-existing Washington State and federal law, dating back many decades, all concur that such speech is not a crime, and "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-63 (1987) at pages 462-463.

State v. Lalonde, 35 Wn.App. 54, 665 P.2d 421 (1983), which reinforced that speech alone was not a crime and was not criminalized by RCW 9A.76.020, was decided *nine* years before Mr. Gulliford was arrested.

This Ninth Circuit Court of Appeals ruling directly complies with, and reinforces, the Washington State Court of Appeals decision in *State v. Lalonde*, supra, that only acts may be criminalized, not speech alone.

It is alleged by the Petitioner that the Court of Appeals did not address prior Supreme Court law such as *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-63 (1987) and *U.S. v. Brice*, 926 F.2d 925, 931 (9th Cir. 1991). This is untrue. The panel cited extensively from *Hill*, supra, stating that the facts of *Hill* and its progeny were "indistinguishable" from those of this case. *Gulliford v. Pierce County*, 136 F.3d at 1350. *Brice*, supra, and several other cases cited by the Appellees, had facts too dissimilar to be useful.

Petitioner states that the majority held that Mr. Gulliford's non-verbal actions before and during his arrest were constitutionally irrelevant and that once Gulliford spoke, he could only be arrested if the words were fighting words. (Pet. 16.)

To the contrary. The Court of Appeals did not rule that Mr. Gulliford's "non-verbal actions" were irrelevant – they ruled that they were *non-existent*. All Mr. Gulliford did was to speak.

Petitioner again attempts to convince this Court to decide a question which is not even remotely related to the facts and the law of this case. Mr. Gulliford did nothing but speak, and all of the precedents, state and federal, are completely consistent on this issue – speech alone, even when it is critical of police or their actions, is not a crime.

III.

AN EXAMINATION OF COURT OF APPEALS DISCRETION REGARDING INSTRUCTIONAL ISSUES IS IRRELEVANT IN THIS CASE

A. Because This Issue Was Repeatedly Raised Before The Trial Court, Petitioner's Question Regarding Issues Which Were "Never Raised" Is Inappropriate

Yet again, Petitioner misstates the facts upon which his question rests. Petitioner asks whether a jury's verdict may be reversed based upon an instructional error "never raised" at trial. (Pet. 22.) The entire premise of the question is false, and has been mischaracterized to this Court.

As the record shows, and as the Court of Appeals found, Gulliford raised these issues in the District Court repeatedly, stating that Mr. Gulliford's speech was not a crime as a matter of law, that the First Amendment protected such speech, that RCW 9A.76.020 did not criminalize such speech, that Mr. Gulliford could not have violated RCW 9A.76.020 simply by speaking (thus creating probable cause for a misdemeanor arrest), and that the previous cases regarding this Washington State statute (including *State v. Lalonde*, 35 Wn.App. 54, 61-62, 665 P.2d 421 (1983)) supported Mr. Gulliford's contentions:

- on 11/30/95[3], in "Plaintiff's Brief in Response to Defendants' Motion for Partial Summary Judgment" (CR 34, 13-15 and 18-21), stating in part:

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[3] The trial of this matter began on 03/18/96, and was sent to the jury on 04/05/96.

> "The Washington cases cited [by Defendants] are both distinguishable on their face from the instant case in that they both involved defendants who took physical actions in addition to making verbal statements."[4]

- on 12/21/95, in "Plaintiff's Motion for Partial Summary Judgment" (CR 61, 12-13 and 17-19), stating in part:

> "[T]he court upheld a person's conviction for obstruction because of his physical actions, not his words.";
>
> and,
>
> "In addition, Mr. Gulliford cannot be arrested for these crimes because his speech was protected by the First Amendment.".

- on 01/18/96, in "Plaintiff's Memorandum in Reply to Defendants' Brief Opposing Partial Summary Judgment" (CR 68, 6-8), stating in part:

> "Amazingly, the Defendants now claim that the crime of obstructing does not require more than speech to convict when the Defendants admit in the same memorandum that it does take 'more than speech to convict'[.]";
>
> and,

---

[4] The second case referred to in this quote was *State v. Kirvin*, 37 Wn.App. 452, 682 P.2d 919 (1984), cited by the Defendants, but which actually made *no* mention at all of RCW 9A.76.020.

> "The defendants do not deny that Mr. Gulliford did not act, and the videotape of the incident clearly shows that he did not act. Therefore, the officers did not have probable cause to arrest Mr. Gulliford for obstructing."

- on 03/15/96, in "Plaintiff's Trial Brief" (CR 113, pp. 7-8), stating in part:

> "Lastly, and most important, the court stated in Lalonde that it was the defendant's actions, *not his words*, that caused the offense. In this case, Mr. Gulliford did not act."

- on 04/05/97, in "Proposed Jury Instruction 31" (CR 141) stating:

> "The First Amendment protects the right of citizens to verbally oppose and/or challenge police action without risking arrest so long as that challenge does not involve a threat or fighting words."

- on 04/05/97, during an unrecorded session *in camera*, Plaintiff's counsel moved for a Directed Verdict on Liability, because Mr. Gulliford's speech *could not* be grounds for an arrest for obstructing, and also argued against the Court's and the Defendants' incorrect interpretation of the obstructing statute – that verbal comments alone *could* be in violation of the obstructing statute and therefore not protected by the First Amendment. During oral arguments before the Court of Appeals, Petitioner's counsel *admitted* that this was true. (*See Gulliford v. Pierce County*, 136 F.3d at 1349.)

- on 04/08/96, during oral arguments regarding Jury Instructions (CR 162, RT 2-3), Plaintiff's co-counsel, Bertha Fitzer, began delineating Plaintiff's objections to Jury Instruction Number 15 and its reference to the First Amendment, when the District Court judge *interrupted* her, clearly spelling out his ruling from the previous Friday – his belief that words alone *could* violate the Washington State obstructing statute:

  > "I think the jury has to balance between that right to speak and the right to speak improperly as obstructing."

- on 04/18/96, in "Plaintiff's Memorandum in Support of Motion for New Trial/JNOV" (CR 154, 1-5, 9), stating in part:

  > "The Ninth circuit and Washington state preclude application of the statute in question to speech alone. Because the court's application of RCW 9A.76.020(3) was unconstitutional, the jury's verdict based upon that law is in error.";
  >
  > and,
  >
  > "Herbert Gulliford was arrested for his statements. His claim of unlawful arrest should never have been submitted to the jury. Instead, this court should have recognized that application of the obstruction statute to speech alone is constitutionally invalid. A new trial, limited to damages, is thus required."

- on 05/02/96, in "Plaintiff's Reply Re: Motion for New Trial" (CR 157, 1-4), stating in part:

> "But [here] there was no "conduct", there was only speech. Application of RCW 9A.76.020 to Herbert Gulliford violated his First Amendment rights as a matter of law."

Petitioner's claim that Gulliford affirmatively misled the District Court (Pet. 25) is also without foundation, and is the result of Petitioner's continued misrepresentation of the District Court record.

In the judge's "Order Denying Plaintiff's Motion for New Trial/JNOV" (CR 156), the judge admitted that Mr. Gulliford had raised this issue again and again, ruling in part:

> "The issues raised by plaintiff were fully discussed and considered at trial[.]"

Unfortunately, the District Court judge believed that RCW 9A.76.020 *did* apply to speech alone, which was reflected in his response to Mr. Gulliford's objection to Jury Instruction Number 15, stating that there needs to be a "balance" between the First Amendment right of free speech and the state obstructing statute.

Jury Instruction 15, in its last paragraph, exactly stated the District Court judge's view:

> "The First Amendment protects the right of citizens to verbally oppose and/or challenge police action without risking arrest so long as that challenge does not knowingly hinder, delay, or obstruct any public servant in the discharge of the public servant's official powers or duties."

The District Court judge felt that speech which so much as "delayed" an officer, even for the shortest period

of time, *could* be considered a crime under RCW 9A.76.020.

Clearly, Respondent Gulliford had informed the District Court of his objections to the District Court's interpretation of RCW 9A.76.020, its state law implications, and its First and Fourth Amendment repercussions, throughout the District Court case, and the Court itself readily admitted this.

B. The Ninth Circuit Is Already The Most Strict Circuit In Interpreting Fed.R.Civ.P. 51

Indeed, the Ninth Circuit Court of Appeals is the most strict Circuit in its application of Fed.R.Civ.P. 51. *See Glover v. BIC Corp.*, 6 F.3d 1318, 1326 (9th Cir. 1993); *United States v. Payne*, 944 F.2d 1458, 1464 (9th Cir. 1991), *cert. denied*, 503 U.S. 975 (1992); *McGonigle v. Combs*, 968 F.2d 810, 823 (9th Cir.), *cert. dismissed*, 506 U.S. 948 (1992); *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991); *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152-53 (9th Cir. 1990); and *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367 (9th Cir. 1979.)

That has not been altered in the least by the decision in *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998.)

Petitioner Thrash cites 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2558 at 468, n. 14 (1994.) The full quotation from that reference states:

> "Nevertheless the Ninth and Seventh Circuits stand alone in reading Civil Rule 51 literally and denying that there is any power to reverse for

> plain error in an unobjected to instruction to the jury in a civil case."

It should be noted that Respondent Gulliford has never claimed "plain error" in the instant case. Rather, Mr. Gulliford has claimed that throughout the case he had repeatedly informed the District Court of his objection to the Court's interpretation of RCW 9A.76.020, and the resultant incorrect jury instruction.

Additionally, Petitioner appears to be asking this Court to intervene, and to force the Ninth Circuit, already the most strict circuit in its interpretation of Fed.R.Civ.P. 51, to be even *more* strict.

After being informed of "Petitioner's Suggestion for Rehearing En Banc", and having had the opportunity to read Judge O'Scannlain's dissent (which pertained solely to the instructional issue), *not a single member* of the full panel of the Ninth Circuit Court of Appeals asked that a vote be taken as to whether to rehear the matter en banc. (Pet. App. B.)

This resounding rejection of Judge O'Scannlain's dissent regarding incorrect jury instructions and the necessary objections thereto demonstrates that there is not even an intra-circuit conflict, much less an inter-circuit conflict.

CONCLUSION

Although all three of the questions posed by the Petitioner purport to be worthwhile issues for this Court to address, not one of the questions even remotely corresponds to the facts, law and legal history of this case.

The Petitioner has mischaracterized, misstated, and misrepresented facts and law in his Petition for Writ of Certiorari. Even the state statute at issue in this matter was incorrectly cited to this Court.

Petitioner Thrash does not even argue that the primary holding of the Court of Appeals decision – that Jury Instruction Number 15 was blatantly incorrect – was in error.

Respondent Gulliford respectfully requests that the petition for writ of certiorari be denied.

Following the Court of Appeals' denial of Petitioner Thrash's "Motion to Recall Mandate" pursuant to the Ninth Circuit's authority to deny a motion for recall/stay when the petition is "frivolous or filed merely for delay" (Ninth Circuit Rule 41-1), Respondent requests damages in an amount sufficient to cover the cost of printing the brief in opposition, pursuant to Supreme Court Rule 42.2.

Dated: July 24, 1998

Respectfully submitted,

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Supreme Court, U.S.
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NO. 97-2082

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1997

DEPUTY PAUL THRASH,

Petitioner,

v.

HERBERT GULLIFORD,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. RESPONDENT'S MISSTATEMENT OF THE CASE

Respondent denies he repeatedly was ordered to disperse prior to his arrest and dismisses petitioner's assertions otherwise as an attempt "to rewrite the facts of this case" and as "misrepresentations." Opp. Br. at 2. Respondent instead asks the Court to believe that the only real evidence before the jury was a videotape and accept his characterizations of it.[1] Such not only ignores that even the videographer admitted he did not record all statements made before the arrest, CR 164 at RT 71-72, but also that numerous witnesses testified such orders were given. Id at RT 27-28, 138, 286-88, 620, 647-48, 677-78, 759-60; Ex. 12 at 4; Ex. 14 at 2.

---

[1] E.g. Respondent claims "the first order to disperse was issued after Mr. Gulliford was already on the ground," Opp. Br. at 2-3, when instead the videotape shows that order was directed by another deputy specifically to a bystander who refused to step back as Gulliford was resisting his arrest by petitioner. See CR 164 at RT 413, 553-54; Ex. 10 at "PM 11:55."

The Court instead is requested to review the actual records cited.

II. REASONS FOR GRANTING WRIT

A. WHETHER FIRST AMENDMENT MAKES A LAWFUL ARREST ACTIONABLE IS AT THE HEART OF THIS CASE.

Respondent concedes it is well settled that "[s]peech does not shield physical crimes," Opp. Br. at 5, but claims he "never moved" and hence "never performed any physical acts...." Id. 6. However, the record is replete with evidence that orders to disperse were given so that respondent's refusal to "move" and verbal confirmation of his refusal violated RCW 9A.84.020 (failure to disperse) and RCW 9A.76.020 (obstructing). See Pet. at 8-9.

Such evidence supported the jury's finding under the instructions that though respondent could not be arrested for "verbal opposition," he could be arrested for other "challenges" that are not "verbal opposition" but that obstruct an officer. CR

146, Inst. 15; Pet. at 10 n. 4.[2] The only reason for overturning the jury's verdict[3] then was the Ninth Circuit's erroneous legal conclusion that Gulliford's refusal to disperse and obstruction of the officers' attempt to arrest a felon was negated by his supposed right to speak.[4]

Such a holding is in direct conflict with that part of this Court's decision in Houston v. Hill, 482 U.S. 451, 462 n. 11

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[2] Respondent objects to examining the actual words of the instruction and makes no attempt to explain how they could be interpreted differently while still giving meaning to all the instruction's language. Opp. Br., p. 7.

[3] If, as respondent claims, the Ninth Circuit instead simply found there were no "non-verbal actions," Opp. Br. at 11, it did so contrary to the record, see cites supra at 2, in usurpation of the jury's role as fact finder, and in disregard of previous precedent interpreting a failure to obey lawful orders as warranting arrest without any First Amendment conflict. See Houston, 482 U.S. at 462 n. 11; Brice, 926 F.2d at 931; Lalonde, 35 Wn.App. at 61-62.

[4] As earlier noted, Pet. at 10 n. 4, instruction 15 was erroneous only in making "verbal opposition" absolutely protected and ignoring that words alone can constitute probable cause where likely to incite immediate lawlessness. See e.g. State v. Hoff, 22 F.3d 222, 224 (9th Cir. 1994). By disregarding this additional ground for the arrest, such only benefitted respondent.

(1987) never discussed by the Ninth Circuit, with that Circuit's own earlier rulings, United States v. Brice, 926 F.2d 925, 931 (9th Cir. 1991), and with Washington precedent on the First Amendment's impact on the crime of obstructing. State v. Lalonde, 35 Wn.App. 54, 61-62, 655 P.2d 421 (1983).

B. QUALIFIED IMMUNITY IS PRESENT PROCEDURALLY AND SUBSTANTIVELY

Petitioner's assertion of qualified immunity as an additional ground for upholding the jury's verdict is somehow characterized by respondent as "apparent arrogance" because an appellee cannot "enlarge the rights conferred by the original judgment" without a cross appeal. Opp. Br. at 7-8. Nowhere does respondent explain how an appellee's rights are "enlarged" by asserting an additional ground for affirming an existing verdict or why he ignores that a jury's verdict should be

affirmed on any ground supported by the record. See United States v. Washington, 969 F.2d 752, 755 (9th Cir. 1992), cert. denied, 507 U.S. 1051 (1993).

Though respondent concedes it is an "interesting question" whether state or federal precedent controls when a supposed right is "clearly established," he claims it is not presented here because the cited state case of State v. Lalonde, 35 Wn.App. at 61-62, is allegedly distinguishable in that he claims he was arrested solely for speech and not for "physical acts." Opp. Br. at 9-10. Such a claim is based on respondent's unexplained disregard of cited testimony establishing that his failure to "move" and his accompanying "verbal opposition" came after repeated orders to disperse. See record cites supra at 2.

Any fair comparison of Lalonde with the facts of this case confirms they are indistinguishable. In both cases a per-

son's attempts to talk to officers about their arrest of another member of a crowd after being told to leave resulted in a lawful arrest for obstructing under RCW 9A.76.020. In both cases the only "physical action" of the arrestees was their remaining despite officers' orders to leave so that their presence and verbal interference justified their arrest. Indeed here, plaintiff's failure to leave when ordered to do so was expressly confirmed by his words and attempt to incite a crowd with a known history of intimidation of officials. In both cases the arrestees' conduct was more than "mere speech" so that in both cases the arrestee's "offense did not arise from his speech, but from the act which accompanied his words." Lalonde, 35 Wn.App. at 61-62.

Petitioner had every reason to believe the arrest would be upheld in state court under the indistinguishable holding

of State v. Lalonde, and the Ninth Circuit's refusal even to address the case squarely raises whether state precedent can be ignored in determining if a right is "clearly established."

C. RESPONDENT FAILED TO OBJECT TO INSTRUCTION AND MET NO EXCEPTION

Respondent nowhere disputes his failure to object to instruction 15 on the ground it violated the First Amendment -- the ground relied upon for reversal -- but, without mentioning the doctrine or its requirements, appears to argue he met the "pointless formality" exception to FRCP 51. Opp. Br. at 15-17. Though respondent again claims petitioner's assertion otherwise "misstates the facts," is a "false" premise and a "continued misrepresentation of the District Court record," Opp. Br. at 12, 16, such apparently also applies to Judge O'Scannlain's dissent which mirrors petitioner's position. See

Gulliford v. Pierce County, 136 F.3d 1345, 1351-53 (9th Cir. 1998). Again, the actual record is at odds with respondent.

The "limited [useless formality] exception" exists where "(1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction." Id at 1349. As Judge O'Scannlain observed, "apart from noting that Gulliford submitted an alternative instruction ..., the majority does not point to anything in the trial record to support its conclusion that the pointless formality exception to Rule 51 applies here." Id at 1353.

Throughout the trial the issue of whether non-inciting words could be grounds for arrest was neither a "disputed matter" nor "argued with the court," but

was accepted by all. CR 27 at 16-7; CR 34 at 21; CR 49 at 6-10; CR 61 at 13; CR 64 at 15-17; CR 113 at 8; CR 154 at 4; CR 157 at 2-3.[5] Further "the record" shows the Court did not know "the party's grounds for disagreement with the instruction" because it repeatedly acknowledged before trial the applicability of this principle, see CR 59 at 6; CR 77, and confirmed that the jury would be allowed to apply it when it explained it would not give defendants' instruction on the right to arrest for plaintiff's non-verbal "conduct" of failing to disperse because:

> Almost all of the theories that have been discussed this morning in this brief discussion are in these jury instructions. I have put them in different ways, obviously, than counsel suggested,

---

[5] Only respondent's belief Instruction 15 favorably stated he could not be arrested for "verbal opposition" explains why he took no exception on this ground when required to do so by FRCP 51, see CR 162 at RT 2-10, nor to the rejection of his alternative instruction despite the Court's specific request he do so. CR 162 at RT 2-3; CR 167 at RT 10.

> but a great deal of what you have urged here by way of exception is entirely arguable under the jury instructions.

CR 162 at RT 19 (emphasis added). Indeed, in later denying plaintiff's motion for a new trial which expressly claimed there was insufficient evidence to find criminal conduct accompanied his words, CR 154 at 2-6; CR 157 at 1-4, the District Court again confirmed that the "issues raised by Plaintiff were fully discussed and considered at trial." CR 156; Pet. at 25-26.

III. CONCLUSION

For the above reasons it respectfully is requested this Court grant certiorari.

DATED THIS 31st DAY OF JULY, 1998.

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